

SAFETEA-LU Section 6004 Categorical Exclusion Assignment of Responsibilities MOU Overview of Key Provisions

(Effective June 7, 2010)

- The MOU allows the Secretary of the U.S. Department of Transportation to assign, and California to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements to prepare environmental assessments or environmental impact statements pursuant to the NEPA regulations promulgated by the Council on Environmental Quality, part 1500, title 40, Code of Federal Regulations.
- The MOU assignment applies only to projects using Federal-aid Highway Program funding or other funding administered by FHWA, or projects requiring approval by FHWA-California Division Office. [Section I(A)]
- The assignment under the MOU pertains only to designated activities described in Stipulation I(B):
 1. Activities listed in 23 CFR 771.117 (c);
 2. The example activities listed in 23 CFR 771.117(d); and
 3. Additional actions listed in Appendix A.
- For projects covered by the MOU, California is also assigned FHWA responsibilities for environmental review and consultation under other federal environmental laws, as defined in Appendix B [Section II(A)].
- The MOU transfers to California all responsibilities for processing the CEs assigned under the MOU including all projects that are CE candidates, any proposed projects meeting the CE criteria in Stipulation I(B) that were determined to be CEs prior to the June 7, 2007 MOU but have not been completed (“proposed projects”), and any required reevaluations of CEs under 23 CFR 771.129 for all CE projects not completed prior to the date of this MOU [Section I(C)].
- This MOU supersedes any existing programmatic agreement that is solely between the State and the FHWA concerning CEs assigned under the MOU [Section I(C)].
- Environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by the FHWA [Section II(C)].
- The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner [Section II(D)].
- The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, state and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process [Section II(D)].
- Any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is excluded from this assignment. Projects may also be excluded at any time during the environmental process if the State determines that the project fails to meet the CE criteria [Section III(A)].
- FHWA shall retain responsibilities for formal government-to-government consultations with Indian tribes [Section II(B)].
- FHWA will evaluate the State’s environmental processing if it has reason to believe that the State’s performance does not satisfy the terms and conditions of this MOU [Section III(B)].
- If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by the State, then the FHWA shall reassume responsibility for processing the project [Section III(C)].
- The State shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. [Section IV(A)].
- For projects and other activities assigned under this MOU that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall [Section IV(B)]:
 1. Institute a process to identify and review the environmental effects of the proposed project.
 2. For CEs other than those designated in 23 CFR 771.117(c), carry out a review of proposed CE determinations prior to the State’s approval of the CE determination.

3. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity.
 4. Document its approval of the determination.
- The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU [Section IV(D)]
 - The State agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable law and this MOU [Section IV(E)].
 - The FHWA and the State shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance [Section IV(F)].
 - The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU [Section IV(G)].
 - The State agrees to consult with FHWA and the U.S. Department of Justice in the event the State and/or FHWA is named as a party in litigation brought in connection with the State's execution of responsibilities under the MOU. [Section IV(H)]
 - The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State [Section IV(G)].
 - The State shall defend, at its own expense, all claims brought in connection with its discharge of any responsibility assigned to the State [Section IV(H)]
 - The State certifies that it has the necessary legal authority and the capacity to [Section V(A)]:
 1. Accept the assignment under this MOU;
 2. Carry out all of the responsibilities assigned to the State; and
 3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 USC §326.
 - The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 USC §326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the 11th Amendment to the U.S. Constitution for the limited purposes of addressing matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that that State assumes pursuant to this MOU and 23 USC §326 [Section V(B)].
 - The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity [Section V(E)].
 - The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment [Section VI(A)].
 - The State will post on its Web site a notice of public availability of copies of the State's quarterly reports, performance reports, and FHWA performance monitoring reports. The FHWA will arrange for the posting of a similar notice on the FHWA's web site or create a link from the FHWA's site to the State's site [Section VI(D)].
 - This MOU shall have an initial term of three (3) years, beginning on the date of the last signature and is renewable for additional terms of three (3) years each if the State requests renewal and the FHWA determines that the State has satisfactorily carried out the provisions of this MOU [Section VII].
 - The State, or the State and FHWA by mutual agreement, may terminate this MOU in its entirety [Section IX(A)].
 - The FHWA may terminate this MOU without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements [Section IX(A)].
 - The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU [Section XI(A)].
 - The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency. In rare or extreme circumstances and based on its observations, the FHWA may submit comments to the State and the other Federal agency if the FHWA determines such comment is necessary and in the Federal interest because [Section XI(B)]:
 1. The FHWA reasonably believes that the State is not in compliance with this MOU; or
 2. unique policy implications for the national Federal-aid Highway Program.
 - The State and/or FHWA may request that the MOU be amended or modified to reflect non-substantive changes, without public notice and comment. [Section VIII(A)]